STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
FIRST CLASS PIZZA & RESTAURANT, INC.	:	
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1995 through May 31, 1998.	:	
	:	DECISION
In the Matter of the Petition	:	DTA NOS. 818049 AND 818050
of	:	
ARSILIO DONOFRIO	:	
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1996 through May 31, 1998.	:	

Petitioners First Class Pizza & Restaurant, Inc. and Arsilio Donofrio, c/o Isaac Sternheim & Co., 1428 36th Street, Suite 205, Brooklyn, New York 11218, filed exceptions to the order of the Administrative Law Judge issued on October 17, 2002. Petitioners appeared by Isaac Sternheim, CPA. The Division of Taxation appeared by Barbara G. Billet, Esq. (Robert Maslyn, Esq., of counsel).

Petitioners did not file a brief in support of their exception. The Division of Taxation filed a brief in opposition to petitioners' exception. Oral argument, at petitioners' request, was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether adequate grounds were presented by petitioners to vacate a default order.

FINDINGS OF FACT

We find the facts as determined by the Chief Administrative Law Judge. These facts are set forth below.

On September 29, 2000, the Division of Tax Appeals received petitions from First Class Pizza & Restaurant, Inc. and Arsilio Donofrio protesting additional sales and use taxes asserted pursuant to assessments L017008993 and L017139425, respectively. Neither petition included a copy of the assessment document or specified the nature of the disagreement between petitioners and the Division of Taxation ("Division"). Both petitions merely asserted that "The assessment is arbitrary and does not reflect the correct amount of tax due."

These matters were first scheduled as formal hearings to be heard by an administrative law judge. However, petitioners elected to have their cases heard as small claims proceedings. On April 22, 2002, the Calendar Clerk of the Division of Tax Appeals advised the parties that their hearing was scheduled to be heard on May 29, 2002. Separate hearing notices were mailed to each of the petitioners, to petitioners' representative and to the Office of Counsel of the Division.

On Wednesday, May 29, 2002 at 1:15 P.M., Presiding Officer Brian Friedman called these matters for hearing. Neither petitioners nor their representative appeared at the hearing. The Division was represented by Phyllis Jacobson who moved for a default determination. On July

3, 2002, Presiding Officer Friedman issued a default determination against each of the petitioners.

On July 8, 2002, petitioners filed an application to vacate the default determination. Petitioners' application consisted of a letter from petitioners' representative wherein he indicated that they never received the Notice of Hearing for the May 29, 2002 hearing. The application did not address the merits of petitioners' case.

The Division responded to the application in a letter dated July 18, 2002. Petitioners submitted a supplemental letter dated September 30, 2002. Neither letter addressed whether petitioners have established a reasonable excuse for failing to appear or whether they have established a meritorious case.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

The Chief Administrative Law Judge determined that petitioners' application to vacate the default determination issued against them should be denied because petitioners did not present sufficient evidence of a valid excuse for their failure to appear nor did they demonstrate a meritorious case. The Chief Administrative Law Judge stated that the hearing notices were separately mailed to each petitioner and to petitioners' representative. The Chief Administrative Law Judge found that it was unlikely that all three of the notices would be lost or misdelivered at the same time and it was petitioners' responsibility to present some explanation of their claim in this regard. Additionally, the Chief Administrative Law Judge noted that petitioners did not address the merits of their case in any manner, as required, in support of a motion to vacate a default determination.

ARGUMENTS ON EXCEPTION

On exception, petitioners argue that they were advised by their representative that they need not appear at the hearing. As a result, even if they did receive the notice of hearing, they had no need to contact their representative upon its receipt. Additionally, petitioners maintain that the agreed upon date of hearing was May 22, 2002 and not May 29, 2002. As petitioners' representative claims to have not received a notice of hearing, the representative had no way of knowing that the hearing was to be held on May 29, 2002. Petitioners assert that the forum for establishing a meritorious case is at a hearing and not on a motion to vacate a default determination.

In opposition, the Division argues that petitioners have not shown a reasonable cause for their failure to appear at the scheduled hearing in this matter nor have they demonstrated a meritorious case. As a result, the Division maintains that the Chief Administrative Law Judge properly denied their motion to vacate the default determination entered against them.

OPINION

We affirm the denial by the Chief Administrative Law Judge of petitioners' application to vacate the default determination issued by the Presiding Officer.

20 NYCRR 3000.13(c)(4) provides as follows:

> After the petition and answer have been served or the time for serving an answer has expired, the controversy shall be at issue and the small claims unit shall schedule the controversy for a small claims hearing. The parties shall be given at least 30 days' notice of the first hearing date, and at least 10 days' notice of any adjourned or continued hearing date. A request by any party for a preference in scheduling will be honored to the extent possible.

20 NYCRR 3000.13(d) provides, in pertinent part, as follows:

> (d) *Adjournment; default*. (1) At the written request of either party, made on notice to the other party and received 15 days in advance of the scheduled hearing date, an adjournment may be granted where good cause is shown. In the event of an emergency, an adjournment may be granted on less notice. Upon continued and unwarranted delay of the proceedings by either party, the presiding officer shall render a default determination against the dilatory party.
>
> (2) In the event a party or the party's representative does not appear at a scheduled hearing and an adjournment has not been granted, the presiding officer shall, on his or her own motion or on the motion of the other party, render a default determination against the party failing to appear.

The record before us clearly indicates that petitioners and their representative failed to appear at the scheduled hearing for which they had been given notice. In addition, petitioners failed to obtain an adjournment of the proceedings. As a result, we agree that petitioners were in default and the Presiding Officer properly rendered a default determination pursuant to 20 NYCRR 3000.13(d)(2) (***see***, ***Matter of Morano's Jewelers of Fifth Ave.***, Tax Appeals Tribunal, May 4, 1989).

The issue before us now is whether such default determination should be vacated. In order for a default determination to be vacated, 20 NYCRR 3000.13(d)(3) provides that "[u]pon written application to the supervising administrative law judge, a default determination may be vacated where the party shows an excuse for the default and a meritorious case" (***see***, ***Matter of Capp***, Tax Appeals Tribunal, January 2, 1992; ***Matter of Franco***, Tax Appeals Tribunal, September 14, 1989).

A review of the record below and the exception filed by petitioners shows that petitioners failed to present an acceptable excuse for not appearing at the scheduled hearing and submitted no evidence of a meritorious case for consideration by this Tribunal.

We, therefore, affirm the order of the Chief Administrative Law Judge holding that petitioners have failed to present an acceptable excuse for their default and have failed to establish a meritorious case. The Chief Administrative Law Judge accurately and adequately addressed these issues and we affirm his order based on the rationale stated therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of First Class Pizza & Restaurant, Inc. and Arsilio Donofrio is denied;

2. The order of the Chief Administrative Law Judge denying the application to vacate the default determination is sustained;

3. The order of the presiding officer holding petitioners First Class Pizza & Restaurant, Inc. and Arsilio Donofrio in default is affirmed; and

4. The petitions of First Class Pizza & Restaurant, Inc. and Arsilio Donofrio are denied.

DATED: Troy, New York
April 24, 2003

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner